



**Tesniere v Majid Al Futtaim Hypermarkets Limited (Cause E422 of 2023) [2024] KEELRC 2004 (KLR) (29 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2004 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E422 OF 2023  
NZIOKI WA MAKAU, J  
JULY 29, 2024**

**BETWEEN**

**BERTRAND TESNIERE ..... CLAIMANT**

**AND**

**MAJID AL FUTTAIM HYPERMARKETS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant filed this suit against the Respondent claiming constructive dismissal from employment. He averred that he was been employed in October 2018 but the Respondent's frustrations led to the Claimant's unwilling resignation from employment. It was averred that the Respondent withheld travel benefits for the year 2020 without consultation, terminated its obligation to settle the house rental bill and reduced the house allowance from USD 24,600 to USD 16,800 without consultation. The Claimant averred the Respondent upon the termination of employment deducted sums that it was not entitled to such as security deposit for the house leased by the Respondent, the 2020 travel benefits and 31 days of unpaid leave. The Claimant averred the Respondent ignored his verbal and written entreaty to amend the terms back to the favourable position. The Claimant averred the Respondent attempted to have him transferred to Uganda within a very short period prompting his resignation. The Claimant thus sought 12 months' salary for the constructive dismissal USD 96,000, salary equivalent to 31 days being USD 10,366, deducted security deposit – USD 2,200, unpaid travel benefits for 2020 – USD 4,349, costs of the suit as well as interest on the sums claimed.
2. In defence, the Respondent averred that the Claimant had opted to be housed by the Respondent and that under this option the Claimant had a rent limit of USD 24,600 and would not therefore receive monthly rent allowance. The Respondent averred the Claimant identified a house along Daisy Close in Runda and the tenancy agreement was entered into by the Respondent and the landlord. The Respondent averred that in accordance with the lease agreement, it paid the security deposit and monthly rent with lease expiring on 31<sup>st</sup> December 2021. The Respondent averred that like most



businesses it suffered challenges at the start of the Covid-19 pandemic in Kenya and had to undertake measures to cut down costs in order to keep the business afloat. It averred that the Claimant was informed on 29<sup>th</sup> April 2020 that the Respondent would cease the provision of accommodation and that employees would be required to take up house rent allowance. The Respondent denied that the Claimant was stripped of any benefit. It averred that it merely substituted one benefit for another and the Claimant did not object. The Respondent averred the Claimant was notified the change in policy would take effect in January upon expiry of the lease. The Respondent averred that the Claimant opted to vacate the premises and notice was given to the landlord and the premises were vacated on 31<sup>st</sup> August 2020. The Respondent avers that it received a letter on 25<sup>th</sup> September 2020 from the landlord informing it of defects following the occupation of the demised premises. The Respondent averred that it deducted the repair charges on the premises from the Claimant's final dues and affirms that it deducted the entire deposit of Kshs. 240,000/- instead of the repair costs which were Kshs. 227,951/- meaning the Respondent was willing to refund a sum of Kshs. 12,000/- to the Claimant being the difference between the sum held as security deposit and the sum deducted for repairs. The Respondent denied that it unlawfully effected the suspension of the travel allowance. It averred that the memo on the suspension of the allowance was sent out to its employee who were entitled to the allowance and that due to the uncertainty of the business in 2020 there was no guarantee that it was to be reinstated or reimbursed. The Respondent denied unlawful deduction of leave days and indicated that as at the time of the resignation the Claimant had exhausted all his leave days. The Respondent averred the Claimant had resigned and was engaged in discussions to offer him engagement in Uganda to lead the chain of stores in that country but the Claimant declined the offer. It averred that it accepted his resignation with regret since it was ready to entrust him with more responsibility in a new market. It denied that it had attempted to arbitrarily transfer the Claimant. The Respondent averred the Claimant had filed a prior suit at the Chief Magistrates Court which he later withdrew and therefore was not entitled to costs on this suit. The Respondent averred the Claimant had no cause of action against it and that his suit should be dismissed with costs.

3. The Claimant and his witness Mr. Sodoliet were heard as was the Respondent's witness Ms. Constance Mwoni. The Claimant and his witness stated that the Respondent changed the travel policy and had the habit of disregarding the views of the employees in management. The Respondent's witness on her part testified that the Claimant was offered support at all stages of his service and the resignation was not precipitated by the Respondent. She testified that the Claimant terminated the lease agreement over the house demised for the employee and there was an amount owed for repairs and payment of the electricity bill. The parties thereafter filed submissions.
4. The Claimant's submissions were not on file at the time of penning the Judgment. The Respondent submitted that the Claimant was required to discharge the burden of proving constructive dismissal as held in the case of *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR where the Court of Appeal enumerated the parameters. The Respondent also relied on the definition of constructive dismissal as defined in *Black's Law Dictionary* in support of the position that there was no constructive dismissal. The Respondent submitted that the Claimant did not discharge the burden and therefore does not have any cause of action against it. It was submitted that the Respondent's conduct did not amount to repudiatory breach of the fundamental terms of the contract. It was submitted that the Claimant resigned on 22<sup>nd</sup> November 2021 while the actions of the Respondent affecting the terms of employment were effected in April 2020. The Respondent submits there was no causal link between its action and the resignation of the Claimant. The Respondent relied on the case of *Kenya Union of Journalists v Standard Group (Cause 171 of 2020)* [2024] KEELRC 1347 (KLR) (6 June 2024) (Judgment) where the Court considered the reduction of salaries without consultation made during the Covid-19 pandemic. It was submitted that the Court in that case took judicial notice of



the extraordinary circumstances prevailing at the time. The Respondent submitted that in regard to the employee travel benefits withheld in the period, the Claimant was not the only employee that was affected. The Respondent submitted that the Claimant acquiesced to the changes as held in the cases of *Godfrey Allan Tolo v Tobias O. Otieno & another* [2022] eKLR and *Nathan Ogada Atiagaga v David Engineering Limited* [2015] eKLR where the Courts held that the employee must resign within a reasonable time. The Respondent also cited the case of *Sehmi v Henkel Polymer Co. Ltd t/a Henkel Chemical EA (Cause E299 of 2021)* [2024] KEELRC 1293 (KLR) (9 May 2024) (Judgment) where the Court dismissed a claim for constructive dismissal as there was no causal link between the resignation and the action of the employer. The Respondent submitted that the Claimant is not entitled to the prayers sought and that his suit should be dismissed with costs.

5. The Claimant sued the Respondent and asserted constructive dismissal. His testimony and that of his witness showed that there was ground for assertion of constructive dismissal in April 2020. However, the circumstances of the Respondent changing the terms of employment were in mid 2020 yet he resigned at the end of November 2021. By that time, the Claimant had been serving the Respondent without any demonstrated animus. As such, the Court is in agreement with the Respondent where it submitted that there was no causal link between the action it took in April 2020 and the resignation of the Claimant. The Respondent's only fault in the mind of the Court was to deduct the deposit it had given for the property rented on behalf of the Claimant as well as refusal to pay for the leave days due. From the record before the Court, the lease was between the Respondent and the landlord. It was the duty of the Respondent to ensure the handover was proper and as such it was bound to ascertain the condition of the premises and not simply leave the property to the landlord who effected 'repairs' which the Court doubts. As such, the Respondent is liable for a full refund of the sum of Kshs. 240,000/- to the Claimant. On the leave dues, the Respondent owed the Claimant for 34.71 days. It would seem these were factored in his final dues calculation. In the final result, the Claimant is only entitled to a refund of the sum of USD 2,200 and no more. As the Claimant was partly successful he will have costs reduced by  $\frac{1}{2}$ . In the final analysis there is judgment for Claimant against the Respondent for:-
- a. USD 2,200 being the unlawful deduction of deposit.
  - b. Costs of the suit reduced by  $\frac{1}{2}$ .
  - c. Interest on (a) above at court rates from date of judgment till payment in full.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 29<sup>TH</sup> DAY OF JULY 2024**

**NZIOKI WA MAKAU**

**JUDGE**

